84-1327

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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

CARLOS S. SOTO and ROBERT
DEMALLORY, on behalf of
themselves and all others
similarly situated, Petitioners

v.

WALTER J. DICKEY, WARREN
YOUNG and THOMAS BORGEN.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UNITED STATE COURT OF APPEALS

For the Seventh Circuit

Nos. 83-2380, 83-2381

CARLOS S. SOTO and ROBERT DeMALLORY on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

vs.

WALTER J. DICKEY, DONALD CLUSEN, and GERALD HERRINGA,

Defendants-Appellants.

CARLOS S. SOTO and ROBERT DeMALLORY on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

vs.

WALTER J. DICKEY, DONALD CLUSEN, and GERALD HEERINGS,

Defendants-Appellants.

Appeal from the United States
District Court for the Eastern
District of Wisconsin.
Nos. 80-C-146 and 80-C-321---
Terence T. Evans, Judge.

ARGUED MAY 11, 1984--
DECIDED SEPTEMBER 20, 1984

Before FLAUM, Circuit Judge, PELL, Senior Circuit Judge, and KELLAM, Senior District Judge.*

KELLAM, District Judge. Alleging violation of their constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution, and of Rules and Regulations of the Waupun Correctional Institution through the improper use of mace, a trade name for tear gas, and similar chemical agents, in the adjustment center at said institution in the State of Wisconsin, Carlos S. Soto and Robert DeMallory (Mallory) instituted a class action pursuant to 42 U.S.C. §1983, Appeal No. 83-2380, for injunctive and declaratory relief.

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*The Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

Carlos S. Soto, also instituted a separate action for damages, injunctive and other relief, Appeal No. 83-2381, pursuant to 42 U.S.C. §1983, for an alleged unlawful macing on December 13, 1979. The incident complained of by Soto in his damage action is also one of the incidents forming a part of the complaint in the class action. The named defendants were the administrator of the Wisconsin Division of Corrections, Superintendent of the Waupun Correctional Institution (WCI) and Assistant Superintendent of Security at WCI, and their replacements. Tried to the court, it rendered its decision on June 29, 1983, granting declaratory and injunctive relief in each action, but denying damages to Soto. The trial court held that the defendants' policies and practices relating to the

use of chemical agents in the Adjustment Center (AC) at WCI violated plaintiffs' constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution and were in violation of the Division of Corrections Administrative Regulations, Chapter HSS 306.08. The court issued an injunction restricting the use of chemical agents against inmates, except in specific circumstances set forth in its order. In the action for damages, the trial court held that a good faith immunity defense was available to defendants and declined to award damages to Soto.

I.

WCI is a maximum security prison, designed for 810 inmates, but having a population of some 1100 or more during

the period in question. The AC, the major segregation facility within the prison, contains 67 cells, 59 of which are arranged in two tiers on the main floor, with the remaining eight cells in the basement. Fifteen of the cells have a wooden outer door in addition to the iron bar doors, and are referred to as double door or wooden door cells. A wire mesh cage in the AC, approximately four feet square and 10 feet high, is used for conducting a strip search of inmates. Inmates are sent to the AC from the general population because of violation of prison rules, such as possession of contraband, theft, refusing to go to work, fighting with prisoners or staff, disobeying rules and refusing to obey orders. Because the average population in the AC during the course of this case numbered about 80,

inmates were, at times, double-celled. The AC in this maximum security prison has been described as the "end of the line."

When mace is used, it is sprayed from a canister approximately two inches in diameter, about five and one-half inches high and contains approximately four and one-half ounces, the equivalent of approximately 35 one-second bursts. It vaporizes upon contact with the human body or other surfaces. From January 1979 until the middle of November 1982, about 130 macing incidents occurred in the AC, or about 2.7 macings per month. Whenever mace is used, a written report of its use must be made by the correctional officer, giving information regarding its use and the reasons therefor. These reports are reviewed by the

Assistant Superintendent, or in his absence, by one designated by him. Only a supervisor may authorize the use of mace, and he is usually the one summoned from outside of the AC. He must be on the spot to authorize its use. While excessive or improper use of a chemical agent can cause some injury, during the four and one-half years of use in the AC there is no evidence in the record or documented at WCI or the AC showing any serious or permanent injury from the use of a chemical agent. Inmates will generally experience itching, irritation or discomfort for a period of time from its use, but washing with water will generally alleviate any discomfort. The procedure prescribed following the use of mace is to have the inmate shower, have his eyes rinsed out, and change his clothing.

This usually gives immediate relief of any discomfort.

II.

Without exception, the institutional officials and officers were of the opinion that the use of mace was much more humane and effective than a flesh to flesh confrontation with an inmate. That is, whenever it is necessary to move an inmate from his cell or for an officer to enter the cell, the procedure used is to have the inmate come to the front of the cell and be handcuffed so that he can be better controlled if he is to be moved, or if the officer needs to enter the cell. If he refuses to come to the front of the cell to be handcuffed, there are few options open to the institution,

one is that three or four guards, suited up in Emergency Response Unit gear (ERU), must enter the cell and physically overpower the inmate and place him in handcuffs. Experience at WCI established this often resulted in serious injury to staff or inmate, or both.

Gerald Heeringa, Assistant Superintendent in Charge of Security at WCI, was responsible for designing and implementing the chemical agency policy upon his return to WCI in 1977. During 11 months of 1977, there were forty one serious assaults on correctional officers, and numerous inmates and staff were injured. Heeringa, along with Superintendent Israel, Major Kahelski and others testified, without contradictions, that since the use of a chemical agent, rather than physical force, the

number of assaults upon and injuries to staff and inmates had been drastically reduced. In fact, the threat of the use of mace, except in a few instances, brings about compliance and in most instances, avoids any necessity of physical force.

The district court found that the inmates see the use of mace as a serious form of force, while the institution sees it as a substitute for actual physical force and the most humane and least harmful method of dealing with obstinate and dangerous inmates. The fact is, that in most instances here mace was used, the inmate immediately complied with the order from the officer, whether it was to be handcuffed in order to remove him from his cell or for other action. The officer was thus permitted to perform his duty without

physical confrontation between staff and inmate. In some of the instances complained of by the plaintiffs, they had told the officers they would not comply with the order unless they were maced, and when maced, they immediately complied.

The institution is well aware of the need for concern in dealing with the inmates in AC. Fortunately, as the trial court found, most of the inmates sent to AC serve their stay and are returned to the general population. A few create most of the problems. Over more than a four year period mace was used only 130 times or two and a fraction times a month, and without a single serious injury.

III.

The provisions of the Wisconsin Administrative Code, Chapter HSS 306,

deals with security at its institutions of confinement. Subsection HSS 306.08 prescribes that chemical agents may be used only to subdue an inmate who poses an immediate threat of bodily injury or death to another or to regain control of the institution or a part of it. In confined or close areas only CN or CS chemical agents and canister dust chemical agent may be used, and the manufacturer's safety instructions must be followed. The use must be authorized by the Superintendent, and may only be discharged by a correctional officer, supervisor or by a trained staff member under the immediate supervision of such supervisor, who has been properly trained in its use. After use, the inmate shall be examined by the medical staff, have their eyes cleaned

with water and be provided with a change of clothes. An incident report must be submitted to the director of the Bureau of Institutions.

The district court found that defendants had used mace in violation of the guidelines set out in the Wisconsin Administrative Code, HSS §306.08, and that since its use did not comply with the above code, it constituted a violation of the Fourteenth Amendment's due process provisions.

IV.

Turning to the more detailed testimony of the five inmates who testified in this case, we are mindful that under Rule 52 of the Federal Rules of Civil Procedure, we are bound by the findings of fact of the trial

court, unless clearly erroneous. This rule, however, does not apply to conclusions of law. Pullman-Standard v. Swint, 102 S.Ct. 1781, 1789 (1982), Tankersley v. Albright, 514 F.2d 956, 966 (7th Cir. 1975). Rule 52 is particularly applicable where the findings are based primarily upon the credibility of the witnesses, Lee v. National Can Corporation, 699 F.2d 932, 936 (7th Cir. 1983), unless the reviewing court, after reviewing the evidence, is left with the definite and firm conviction that a mistake has been committed. Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 291, 80 S.Ct. 1190, 1200 (1960); Klockner, Inc. v. Federal Wire Mill Corp., 663 F.2d 1370, 1375 (7th Cir. 1981). An "appellate court must set aside the trial court's findings if it concludes that they are 'clearly

erroneous.'" Kelly v. Southern Pacific Company, 419 U.S. 318, 323, 95 S.Ct. 472, 475 (1974).

"Evaluations of evidence reached by the accurate application of erroneous legal standards are erroneous evaluations." Protective Committee, etc. v. Anderson, 390 U.S. 414, 445, 88 S.Ct. 1157, 1173 (1968).

The five inmates, including the two named plaintiffs, testified to instances in which they were maced. Admitted as exhibits in the case were reports filed by the supervisors in some 130 instances in which they had used mace at WCI over a four and a fraction years period. The trial court's findings, upon which it determined to issue its injunction, set out that most of the instances of macing involved situations where inmates were locked in their cells or

in the strip cage; that witnesses Mallory, McAdoo, McKinley and Soto were maced under those conditions; that most conduct violations in the AC were for disrespect and disobeying orders; that most of the inmates sent to AC are respectful to officers, do their adjustment time and are returned to the general population; and that the procedures for the use of a chemical agent in the AC do not require that the officer in charge create a show of force by gathering other correctional officers and suiting them up in ERU before the chemical agent was used.[1/] The ERU gear consists of a helmet with a flip down face guard, leg guards, a four

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[1/] The record establishes that on the occasion of each of the macings referred to, there were numerous officers present.

and one-half foot high plastic shield used to push an inmate in the direction it was desired he move, a jump suit or type of coveralls made of polyester material, gloves and a wooden baton. In addition to the above, the trial court's opinion sets out that chemical agents have been used against inmates who were throwing liquids from their cells, yelling obscenities, refusing to remove a book from the butt of the door, refusing to return a meal tray, refusing to properly submit to a strip search, and refusing to be double-celled, and that some inmates suffered the effects from macing not directed to them.

Many of the findings made by the trial court are supported by the evidence. Where the trial court erred was in the conclusions reached from a consideration of only a part of the

evidence. Some of the findings leave out facts clearly established by credible, material and uncontradicted evidence. For instance, the trial court's finding that inmates were maced while locked in their cell or in the strip cage, or handcuffed, is supported by evidence. But, such findings do not set forth the reason, necessity or basis for the macing, and the evidence relative to the incident. Where the trial court found that inmates were maced to create and preserve an atmosphere of discipline, to gain compliance with non-emergency orders, to stop yelling obscenities, stop throwing liquids from their cells, refusing to move a book from the butt of the wooden door to a cell, refusing to return a meal tray, and merely refusing to be double-celled, they are clearly erroneous. While

McKinley, McAdoo, Mallory and Soto each asserted they were passive, locked in their cells, had not made threats against anyone, did not possess a weapon, had violated no rule at the time they were maced, and that there was no legitimate reason to mace them, the evidence established the contrary. The record and exhibits uncontradictedly establish that when an inmate who is hollering, rattling the bars, yelling obscenities at the staff, throwing objects from his cell at the staff, refused to return a meal tray, blocks the closing of a door, refuses to be double-celled or refuses to comply with direction, he is ordered to come to the front of the cell and put his hands out so that he can be handcuffed, guards can then enter the cell and remove a meal tray or an object used to throw liquid; and

where necessary, moved him to another cell with a wooden door which can be closed to prevent his hollering or yelling from disturbing others, or prevent him from throwing liquid or other objects on the officers, or double-celled or whatever is appropriate. If he refuses to come to the front of the cell to be handcuffed after being ordered so to do, and the guard cannot prevail upon him to do so, a supervisor is called. The supervisor then attempts to persuade the inmate to comply with the order. If the inmate refuses, he is then ordered by the supervisor to come to the front of the cell and be handcuffed. If he still refuses, he is told that unless he does do so, he will be maced. If he still refuses, mace is then used. In most every instance, the inmate then complies

with the order. He is handcuffed and removed from the cell to permit a guard to enter, and when appropriate the inmate is moved to another cell. Reference in the trial court's opinion to inmates Mallory, McAdoo, McLaughlin and Soto requires specific comment. The evidence shows without challenge that the first four were a serious disciplinary problem. They were involved in many violations of the rules and orders of the institution, and spent much time in the AC. Mallory testified that of the eight years in confinement he had spent approximately six of them in the AC. McAdoo, McLaughlin and Soto each had spent about two years in the AC. Mallory and McAdoo admitted they had been previously found guilty of assaulting a staff officer. Soto admitted he had assaulted numerous

prisoners and staff officers while he was in a Pennsylvania prison and that he had been involved in fights with several inmates at WCI. He admitted he struck officer Harkinson and that he tried to kick Dr. Bergen because he thought he was a crackpot. He admitted throwing his dinner tray at an officer on July 15, 1981. He admitted he was a real problem to get along with because he wanted to be himself. He, and the other inmates were described as unpredictable--passive at one moment and aggressive at another. The finding that Mallory was maced for refusing to return his meal tray, that McAdoo was maced for throwing milk on an officer; that McKinley was maced for refusing to remove a book so the wooden door to his cell could be closed, and while he was in the strip cage; and that Soto

was maced for refusing to be double-celled is only a part of the evidence. What the finding did not include was the uncontradicted fact that in each instance these four inmates were maced for refusing to obey an order to come to the front of the cell to be handcuffed so that they could be moved to another cell.[2/] Mallory testified that he refused to return the meal tray to the guard;[3/] that Lt. Prieve was summoned and requested him to return the tray but he refused.

2/Plaintiffs' expert, Dr. Kirkham, testified it was appropriate for the guards to handcuff the inmate before attempting to enter the cell.

3/The plaintiffs' expert witness, Dr. Kirkham, testified a meal tray can be used as a weapon; that an inmate who had refused to return a tray should not be permitted to keep it. In fact, he replied "absolutely not," and that the rule on return of trays must be enforced.

After the lieutenant was unable to persuade him to do so, the lieutenant ordered him to come to the front of the cage and be handcuffed so an officer could enter the cell and collect the tray. Mallory refused, and said the only way he would come to the front and be handcuffed was if he was maced. After being maced, he admitted he came to the front of the cell and was handcuffed. The tray was then removed.[4/]

In the instance of inmate McAdoo, the evidence established numerous inmates had been throwing articles and unknown fluids at the officers, and

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[4/]Mallory says that again the next day he refused to return his tray and that on that occasion, three or four guards suited up in ERU gear came in and removed the tray. There is no record of such an incident in the files of the AC, and Assistant Superintendent Heeringa said that if such an event occurred, a record would have been made of it.

that mass confusion existed in the AC. Several inmates had been moved to controlled status. Captain Nichols was summoned to the AC. McAdoo testified he was frustrated because his request for a tylenol tablet had not been responded to, and that he decided he would go up on the first two officers who came by his cell. Captain Nichols and Lieutenant Smith were the victims of milk thrown by McAdoo. Captain Nichols ordered McAdoo to come to the front of the cell so he could be handcuffed. He refused, and was sprayed with mace, after which he came to the front of the cell, was handcuffed, carried to the strip cage and searched. After all containers that could be used to throw a liquid were removed from his cell, his cell was cleaned and he was returned.

Inmate McKinley was maced on two separate occasions. The first while in the strip cage for refusing to spread his buttocks for a strip search,[5/] after being ordered to do so by the lieutenant. After the macing guards in ERU gear entered the cage and completed the search. On the other occasion inmates had been throwing objects and liquids at officers. Captain McLaughlin was called to the AC. McKinley said he placed a book in between the butt of the door and the door facing, preventing the solid wooden door from being closed. With it closed, the

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5/In Bell v. Wolfish, 441 U.S. at 558, 99 S.Ct. at 1884, the court held that a requirement that all inmates expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution was not unreasonable and may be conducted on less then probable cause.

inmate could not throw articles at the officers. Captain McLaughlin ordered McKinley to remove it.[6/] After he refused, he was ordered to come to the front of the cell and be handcuffed. When he refused he was told he would be maced if he did not do so. He was maced and immediately came to the front of the cage and was handcuffed. After he was handcuffed at the front of the cell, he threw milk on the captain and officer Beam.

Inmate Soto was told he would have to double-cell. He testified he told the officer on several occasions he would not be double-celled, period. When ordered to pack up his things so another inmate could be moved in with him, he testified he said he would not

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6/An officer could probably have removed it, but he would have exposed himself to having liquids thrown at him.

do it. The lieutenant was called and received the same response. He was ordered to come to the front of the cell to be handcuffed but refused. He was maced and immediately came to the front of the cell and was handcuffed.

While some of these inmates asserted they had not been ordered to come to the front of the cage and be handcuffed, in every instance, after they were maced, without further order, they came to the front of the cell and were handcuffed.

The trial court found that inmates were not given a shower or attention for their eyes after being maced. Such finding overlooks not only the testimony of the staff but also the testimony of the inmates. In all instances but one the inmates were offered or given a shower. In that instance, the unit was on lockdown and

the water was cut off because the inmates were throwing it from their cells. In each instance the inmate was furnished clothing, and a nurse rinsed out the eyes of the inmates, except where the inmate refused to have it done. While the findings say the cells were not cleaned, in all instances referred to except one, the cell was cleaned or the inmate removed to another cell. Lastly, the court found the inmate Johnson suffered some slight effects from the macing of other inmates by the mace reaching his cell and that McKinley said he had some ill effects from the macing of others. We need not deal with these issues because under the evidence in this case they do not reach constitutional proportions.

V.

In providing security, the institution must be concerned about the safety of its staff as well as of its inmates. It has the duty to protect the staff from assaults, whether by physical attack upon them, or whether by the throwing of objects or liquids on them. The same kind of duty exists to protect other inmates.

The inmates in AC are there for failure to obey the rules and regulations of WCI, such as possession of contraband, fignting, assault on staff officers and so on. Disturbances arise. Inmates become edgy. They get noisy and almost out of control. They are described as unpredictable--passive at one time and aggressive the next moment. On one occasion 26 inmates broke up meal

trays and made weapons of them. Assistant Superintendent Heeringa testified he carried scars on his body from opening a cell door of an inmate who appeared passive, but became violent. Injuries occur to the staff even when they enter the cell in the ERU gear. While the helmet covers part of the fact, the helmets can and have been knocked off the head of the guards. Too, the helmet does not cover the full face or protect the front of the neck. One guard dressed in the ERU equipment had his arm cut by a razor blade which the inmate had taped to his hand, requiring more than 90 stitches.

When an order is given to an inmate there are only so many choices available to the correctional officer. If it is an order that requires action by the institution,

and the inmate cannot be persuaded to obey the order, some means must be used to compel compliance, such as a chemical agent or physical force. While experts who testified on behalf of the plaintiffs, suggested that rather than seek to enforce orders, it was possible to leave the inmate alone if he chooses not to obey a particular order, and wait him out, experience and common sense establish that a prison cannot be operated in such a way.

Discipline in a maximum security correctional institution no doubt is difficult, but it is essential if the prison is to function and provide for the care, safety and security of the staff and inmates. Services to provide food, clothing, health, medical, cleaning, laundry and all other services would come to end

without discipline. Mob rule would take over. There would not, and could not, be any protection for staff or inmates. Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them. Someone must exercise authority and control. One can quickly reason what would happen in a maximum security prison without proper discipline.

The evidence establishes that it is the policy and practice at WCI for officers to enter a cell to enforce compliance with orders. Inmates are and must be required to obey orders. When an inmate refused to obey a proper order, he is attempting to assert his authority over a portion of the institution and its officials. Such refusal and denial of authority places the staff and other inmates in

danger. One of the plaintiffs' expert witnesses agreed that the institution cannot permit an inmate to violate a rule or disobey an order and that action must be taken to compel compliance with a lawful order.

VI.

Imprisonment carries with it the circumscription or loss of many significant rights and in some cases the complete withdrawal of certain rights, all of which are justified by the considerations underlying our penal system. Hudson v. Palmer, ____ U.S. ____, ____ S.Ct. ____, 52 L.W. 5052 (1984). Prisons are places of confinement of persons who have demonstrated their inability to control and conform their behavior to the legitimate standards of society.

Most of those sent to the AC have demonstrated their lack of respect for the rules and regulations of the institution and their disregard of the rights of others. A reflection upon the facts demonstrate the severe and grave problem confronting prison officials. As pointed out in Hudson v. Palmer, supra, during 1981 and the first half of 1982, in state and federal prisons, there were over 29 riots or similar disturbances, a number of prison personnel were murdered by prisoners, and over 120 prisoners were murdered by fellow inmates. In the federal system during 1983, there were 11 inmate homicides, 359 inmate assaults on other inmates, and 227 inmate assaults on prison staff. There were in the same system in 1981 and 1982, over 750 inmate assaults on other inmates and over 520

inmate assaults on prison personnel. With such statistics, we must "strike the balance in favor of institutional security" which is "central to all other correctional goals." Hudson v. Palmer, supra. Knowledge of the above facts make it clear that within the institutions "prison administrators are to take all necessary steps to ensure the safety of not only the prison staff and administrative personnel, but visitors." Hudson v. Palmer, supra. See also Bell v. Wolfish, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878 (1979).

The district court's assertion that we have recognized the trend towards restricting the use of chemical agents misinterprets what we have said, and the decisions of other courts.

In Stringer v. Rowe, 616 F.2d 993, 998 (7th Cir. 1980), we said:

> In order to establish a violation of the Eighth Amendment, a plaintiff must show that prison officials intentionally inflicted excessive or grossly severe punishment on him or that the officials knowingly maintained conditions so harsh as to shock the general conscience. United States ex rel. Miller v. Twomey, 497 F.2d 701, 719-20 (7th Cir. 1973), cert. denied, Gutierrez v. Dept. of Public Safety, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 102 (1974). Courts have sanctioned the use of tear gas "when reasonably necessary . . . to subdue recalcitrant prisoners." Clemmons v. Greggs, 509 F.2d 1338, 1340 (5th Cir. 1975).7/

7/This case was before us on the issue of whether a motion for summary judgment on behalf of defendants was justified. Finding a disputed issue of a material fact, it was remanded for further proceedings.

Later in Lock v. Jenkins, 641 F.2d 488, 496 (7th Cir. 1981), we quoted with approval from Johnson v. Glick, 481 F.2d 1028 (2nd Cir.), cert. denied sub non, Employee-Officer Jones v. Johnson, 414 U.S. 1033, 94 S.Ct. 462 (1973) this language:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm. 481 F.2d at 1033.

Courts should proceed cautiously in making an Eighth Amendment judgment for unless the Supreme Court reverses it, "a decision that a given punishment is impermissive under the

Eighth Amendment cannot be reversed short of a constitutional amendment," so that revisions cannot be made in the light of further experience. Rhodes v. Chapman, 452 U.S. 337, 351, 101 S.Ct. 2392, 2401 (1981); see also Gregg v. Georgia, 428 U.S. 153, at 176, 96 S.Ct. 2909, at 2926. In considering whether the Eighth Amendment has been violated, it must be rembered that such inquiries "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." Rhodes v. Chapman, supra, 452 U.S. at 351, 101 S.Ct. at 2401. Bell v. Wolfish, 441 U.S. at 539, 99 S.Ct. at 1874. The Supreme Court in Procunier v. Martinez, 416 U.S. 396, 404-405, 94 S.Ct. 1800, 1807 (1974) and in Rhodes

v. Chapman, supra, 452 U.S. at 351, n.16, 101 S.Ct. at 2401, n.16, pointed out some of the problems of prisoners and reasons why federal courts adopted a broad hands-off attitude towards problems of prison administration, and the limitations on the scope of federal review of conditions in state penal institutions. It said in Procunier v. Martinez, supra:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstances to effective discharge of these duties are too apparent to warrant explication.

Rhodes v. Chapman, supra, n.16, says:

We have sketched before the magnitude of the problems of prison administration. Procunier v. Martinez, 416 U.S. 396, 404-405, 94 S.Ct. 1800, 40 D.Ed.2d (1974). See generally National Institute of Justice, American Prisons and Jails (1980) (5 Vols.).

It suffices here to repeat:

[T]he problems of prisons in America are complex and intractable, and more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." Procunier v. Martinez, supra, at 404-405, 94 S.Ct., at

> 1807 (footnote omitted). See also Wolff v. McDonnell, 418 U.S. 539, 561-562, 568, 94 S.Ct. 2963, 2977, 2980, 41 L.Ed.2d 935 (1974); Jones v. North Carolina Prisoners' Labor Union, supra, at 125, 97 S.Ct., at 2537.
>
> Since our decision in Martinez, the problems of prison population and administration have been exacerbated by the increase of serious crime and the effect of inflation on the resources of states and communities. This case is illustrative. Ohio designed and built SOCF in the early 1970's, and even at the time of trial it was found to be a modern "top-flight, first-class facility." Supra, at 2395. Yet, an unanticipated increase in the state's prison population compelled the double celling that is at issue. 452 U.S. at 351, 101 S.Ct. at 2401, n.16.

Central to all other correctional goals is the institutional consideration of internal security

within the correctional facilities themselves, and "preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." Bell v. Wolfish, supra, 441 U.S. at 546, 99 S.Ct. at 1878. If prison officials are to be free to take appropriate action to ensure the safety of inmates and correctional personnel, they must be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of correctional officers, and without substantial

evidence to indicate such officials have exaggerated their response to these considerations, courts should defer to their judgment. Not only are such administrators in a better position to know and determine what action or remedies are needed and proper, but the operation of our correctional systems and facilities is within the responsibility of the Executive and Legislative branches of government. Bell v. Wolfish, 441 U.S. at 547-548, 99 S.Ct. at 1878-1879; Procunier v. Martinez, 416 U.S. at 405, 94 S.Ct. at 1807. See also, Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800 (1974); Hewitt v. Helms, supra. The Supreme Court has "repeatedly said both that prison officials have broad administrative and discretionary authority over the institution they manage, and that lawfully incarcerated

persons retain only a narrow range of protected liberty interests." Hewitt v. Helms, 103 S.Ct. 864, 869 (1983).

The Eighth Amendment prohibits the infliction of cruel and unusual punishment; that is, the infliction of excessive or grossly severe punishment disproportionate to the severity of the offense, or the unnecessary and wanton infliction of pain or infliction of pain without justification. Eighth Amendment judgments "should neither be nor appear to be entirely the subjective views of judges," but such "judgments should be informed by objective factors to the maximum possible extent." Rhodes v. Chapman, 452 U.S. 346, 101 S.Ct. at 2399. Hence, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional,"

and to "the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Id.

The Supreme Court has never held, nor have we or any other court of appeals, so far as we can determine, that the use of tear gas or a chemical agent is a per se violation of the Eighth Amendment, whether an inmate is locked in his cell or not. What we, and other courts have held, is that the appropriateness of the use must be determined by the facts and circumstances of the case. We have held, and now restate that it is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary for the sole purpose of punishment or the infliction of pain.

Thus, we adhere to what we said in Stringer v. Rowe, 616 F.2d at 998, set out above. The use of mace, tear gas or other chemical agent of the like nature when reasonably necessary to prevent riots or escape or to subdue recalcitrant prisoners does not constitute cruel and inhuman punishment. Lock v. Jenkins, supra; Poindexter v. Woodson, 510 F.2d 464, 466 (10th Cir.), cert. denied, 423 U.S. 846 (1975); Clemmons v. Greggs, 509 F.2d 1338, 1340 (5th Cir.), cert. denied, 423 U.S. 946 (1975); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966); Bailey v. Turner, No. 82-6552, (4th Cir. June 7, 1984); Donahue v. Maynard, 437 F.Supp. 47 (D. Kan. 1977), and this is so whether the inmate is locked in his prison cell or is in handcuffs, Bailey v. Turner, supra; McCargo v. Mister, 462 F.Supp.

813 (D. Md. 1978); Greear v. Loving, 391 F.Supp. 1269 (W.D. Va. 1975). The "use of the substance (tear gas) in small amounts may be a necessary prison technique if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required." Spain v. Procunier, 600 F.2d 189, 195 (9th Cir. 1979). Continuing in Spain, the court said:

> The infliction of pain and the danger of serious bodily harm may be necessary if there is a threat of an equal or greater harm to others, as is reflected in the doctrine of self defense which permits one to do harm to another person who threatens unlawfully to do an equal or greater harm to another.

The responsible institutional personnel on the spot are in a better position to determine when its use is

necessary than the courts. Clearly, the use of a chemical agent in dangerous quantities is justified only in narrowly defined circumstances but the use of nondangerous quantities of the substance in order to prevent a perceived future danger does not violate "evolving standards of decency" or constitute an "unnecessary and wanton infliction of pain." We think its use can be justified in situations which are reasonably likely to result in injury to persons or a substantial amount of valuable property. 600 F.2d at 196. Prison officials' responsibility extends to the protection of the guard, as well as to the inmates. The "safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." Hewitt v. Helms, 103

S.Ct. at 872. We should therefore be extremely cautions before attempting to prohibit or limit the necessary means by which they may carry out this responsibility.

The record in this case fails to disclose that prison officials unjustifiably used excessive force against plaintiffs, or other inmates or that they failed to act in good faith and with a reasonable belief of the lawfulness of their actions under the circumstances.[8/] The actions were therefore not a violation of the Constitution, and since not a violation of the Constitution, "it does not in itself subject an inmate's treatment by prison authorities to judicial oversight." Montayne v.

8/The trial court found the action of the guards in macing Soto was in good faith.

Haymes, 427 U.S. at 242, 96 S.Ct. at 2547; Hewitt v. Helms, 103 S.Ct. 869. The inmates' argument is that the use of the chemical agent is greater force than is necessary to satisfy the institution's legitimate interest in maintaining security. However, in the instances shown in the record the chemical agent was used for failure of the inmate to obey a direct order and the use of mace was a reasonable response to the institution's legitimate security concern. The use of mace is not a per se violation of the Eighth Amendment. Appellees have not met their burden of showing that the defendants intentionally used exaggerated or excessive means to maintain discipline and provide the needed security for the institution. Nor have they shown it was used to inflict excessive or grossly severe

punishment on them. It is not a question here of whether the district court's plan or the institution's plan for maintaining order and discipline is best, "but in what branch of the government is lodged the authority to initially devise the plan," Bell v. Wolfish, 441 U.S. at 562, 99 S.Ct. at 1886. The evidence does not establish that the actions and conduct of the institution or its personnel, or the regulations of the institution or their application violate the Eighth or Fourteenth Amendments, or that a chemical agent has been unjustly or improperly used.

The decision of the district court is therefore reversed and these cases remanded with direction to dissolve the injunctions issued and to dismiss

the complaints with direction that defendants recover their costs.

REVERSED AND REMANDED.

A true Copy:
Teste:

_____
Clerk of the United
States Court of Appeals
for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CARLOS S. SOTO and
ROBERT MALLORY, on behalf
of themselves and all
others similarly situated,

Plaintiffs,

vs. Civil Action
No. 80-C-146

ELMER O. CADY, THOMAS R.
ISRAEL and GERALD HEERINGA,

Defendants.

CARLOS S. SOTO,

Plaintiff,

v. Civil Action
No. 80-C-321

ELMER O. CADY,
Administrator, Division
of Corrections of the
State of Wisconsin, et al.,

Defendants.

[June 29, 1983]

DECISION

Case number 80-C-146 is a class action suit brought on behalf of

inmates confined in the Adjustment Center at the Wisconsin Correctional Institution at Waupun, Wisconsin. The inmates seek an injunction, or alternatively declaratory relief, prohibiting the current uses of chemical agents ("mace" hereinafter) at the prison.

Case number 80-C-321 is an individual macing suit brought by Carlos S. Soto, a former inmate at Waupun. Soto's individual claim for damages was consolidated and tried with the class action claims in 80-C-146.

Trial to the court was held in November, 1982. The first day of the trial took place at the prison. During the first day, I heard testimony from inmates and visited the Adjustment Center. The balance of the trial took place in Milwaukee. The

following discussion precedes my formal findings of fact and conclusions of law.

I have been to the prison at Waupun on many occasions. I have also had a number of opportunities to visit the prison's Adjustment Center. While the prison, and particularly the Adjustment Center, has never been what one would call a pleasant place, I have never seen it as dangerously overcrowded as it was when I was there during this trial. The prison is, of course, holding over 300 inmates beyond its approved capacity. Inmates in the Adjustment Center are dangerously doubled up in cells that are small even for one person. In short, the situation is an accident waiting to happen. I believe that the severe overcrowding at the prison,

especially in the Adjustment Center, has contributed significantly to the tensions that precipitated many of the incidents about which I have heard testimony or reviewed reports.

The issues here have not changed from what they were on February 22, 1982, when I issued a decision denying a motion for summary judgment in the class action. In addition to the prison documents describing macing incidents and affidavits of inmates and guards considered in connection with the motion, I have now heard testimony from both sides regarding several macing incidents.

Robert Mallory testified that he was maced on February 4, 1981, while locked in his cell. Mallory refused to return his plastic meal tray. He placed the tray on his bed, went to

the back of his cell and sat down. He was not violent, did not make threats, and had no weapons. He was ordered to return the tray. When he refused, he was maced. The next day, Mallory again refused to return a meal tray. This time, guards, dressed in riot gear, entered his cell and retrieved the tray without incident.

Laron McKinley was maced on November 24, 1980, for refusing to move a book which was preventing the closing of an outer wooden cell door. McKinley was locked behind metal doors at the time. McKinley was also maced on September 26, 1980, while he was locked, naked, in a small strip cage. He had refused to spread his buttocks for a search.

Soto, the individual plaintiff in 80-C-321 and a member of the class in

80-C-146, was maced on December 13, 1979, while he was locked in a cell and handcuffed. Soto had refused to be double-celled with another inmate whom Soto considered dangerous. William McAdoo was maced on October 11, 1980, for throwing milk on a correctional officer.

All in all, according to prison incident reports, about 130 macing incidents occurred between January 19, 1979 and November 16, 1982. The incidents differ, of course, in the degree of disruptive conduct exhibited by the inmates and in the amount of mace used by the officers. The defendants do not seriously dispute the facts; rather, they state that in each case direct orders were given the inmates--for instance, to return a tray, remove a book, submit to a strip

search or come to the front of the cell to be cuffed. When the orders were disobeyed, according to the defendants, "mace was applied" to force compliance.

Plaintiffs argue that the use of mace under the circumstances described in this record are in violation of their Eighth Amendment right to be free from cruel and unusual punishment. They also claim that the macings are in violation of the regulations of the State of Wisconsin under which the prison operates and that, therefore, the use of mace violates the inmates' rights under the Fourteenth Amendment. Defendants argue that their use of mace is proper under the Eighth Amendment; that the plaintiffs have no liberty interest in the defendants' observation of their

own administrative regulations, so that no due process claim exists; and that even if such a claim existed, defendants are acting within the regulations.

Cases involving the use of chemical agents in prisons reveal the reluctance of the federal judiciary to get involved with the administration of state prisons. They show a recognition on the part of judges that prison officials are in a difficult and dangerous business. See, for instance, Hendrix v. Faulkner, 525 F.Supp. 435 (E.D. Ind. 1981), and cases cited therein.

The decision of February 22, 1982, reflects my reluctance to be involved with the administration of the prison at Waupun and a recognition of the difficulty of running a prison. At

that time I stated that it was a short step from the case law regarding macing to the "conclusion that the Incident Reports in the record may, in some instances, reveal that mace is employed in a manner not sanctioned by the Eighth Amendment to the Constitution." p. 10. I also stated that defendants' conduct was likely to be found in violation of their own regulations. A preliminary injunction was denied, however, on the basis that to grant it would disserve the public interest:

> Because of the serious and difficult tasks faced by defendants to this action, I am convinced that the public interest is served by allowing them time to reevaluate their interpretation of their regulations before being faced with a federal court order. p. 11.

So far as I can tell, the decision of February 22, 1982, has had no effect on defendants' views. Consequently, I must set aside my reluctance to become involved in the administration of the prison and my hope that the defendants would recognize that regardless of their personal views, the law, while not entirely clear, requires curbs on the use of chemical agents. The point has come to be certain that the constitutional rights of the inmates are not being violated.

The Eighth Amendment prohibits punishment which is incompatible with "evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97 (1978). The use of chemical agents in prisons has required courts to

consider whether its use is compatible with contemporary attitudes toward what constitutes cruel and unusual punishment. Some courts have sanctioned the use of tear gas and other chemicals. See Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969); Washington v. Anderson, 387 F.Supp. 412 (E.D. Okla. 1974). Other courts in later cases have taken a close look at the physical effects of chemical agents and have determined that under some conditions their use violates the Eighth Amendment. See Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).

Two fairly recent decisions from the Court of Appeals for this Circuit have recognized the trend toward restricting the use of chemical agents. In Stringer v. Rowe, 616 F.2d 993, 999 (7th Cir. 1980), the court

pointed out that while courts in the past have sanctioned the use of chemical agents when reasonably necessary, recent decisions have "emphasized that use of chemical agents such as tear gas and mace by prison officials to subdue individual prisoners, rather than to quell large disturbances, should be more restricted."

In Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981), the court considered the use of tear gas and other chemical disabling agents on pretrial detainees. The analysis proceeded under the Fourteenth, not the Eighth Amendment. However, the court implied that the issues posed were the same. Relying on Stringer, supra and Spain, supra, the court concluded that only in "rare occasions" would it be

appropriate to use chemical agents to control inmates already confined in their cells. In Lock, supra, the record shows that the inmates were engaged in "inciting to riot at a time of tremendous tension in the prison following an attempted escape and the taking hostage of the prison Warden and several others." The court concluded:

> We believe that the facts shown regarding this institute constitute one of the rare occasions when the use of tear gas against persons locked in cells was not unjustified. At 496.

However, as to other incidents revealed in the record, the conclusion was contrary. The use of gas to retrieve a metal food tray was found to be constitutionally impermissible. Also impermissible was the use of a

chemical agent to stop inmates from shouting and uttering threats:

> We have also found unconstitutional the use of a chemical agent to stop unpleasant but not threatening behavior by safekeepers locked in their cells. At 500.

These cases do not offer clear guidance in all situations as to when the use of mace is justified and when it is not. They do, however, indicate that some of the incidents in the record before me describe conduct which violates the Eighth Amendment. The incidents involve macing of inmates locked either in a cell or a strip cage. There appears to be no recognition on the part of the defendants that such macing is highly questionable. For the most part, there appears to be no indication that the capacity of an individual inmate

for violence is considered in determining whether mace is used. A blanket statement that the individuals in the Adjustment Center are the most troublesome in the prison system is not an adequate substitute for looking at the individual case. Prisoners who one day may be walking free in the yard can commit an infraction of prison rules and the next day be locked in cells in the Adjustment Center. In addition, the fact that one day inmate Mallory was maced for not returning his food tray and the next day he was not maced for the same action shows the apparent arbitrary nature of the decisions.

In many cases the conduct on the part of the inmates is passive. Stopping the inmates' conduct could in no way be characterized as urgent.

Also, some of the reports involved macing for yelling and shouting, macings prohibited by Lock. Thus, even though the requirements of the Eighth Amendment are not entirely clear under the case law, some of the macings revealed in this record are violations of the constitutional rights of the inmates involved.

The Wisconsin Administrative Code provides somewhat more specific guidelines for Wisconsn prison officials. H.S.S. § 306.08 provides that chemical agents can be used only in two situations: (1) to subdue an inmate who poses an immediate threat of injury or death to another, and (2) to regain control of an institution or part of an institution. The regulations also provide that the use of chemical agents "shall be authorized only by the

Superintendent." Plaintiffs argue that defendants have violated these reguations and therefore have also violated the inmates' due process rights under the Fourteenth Amendment. Defendants argue that "there is no basis in the record that the plaintiffs had an expectation of a liberty interest in defendants' observation of their own administrative regulations. ..." Brief, p. 22. In support of this proposition, defendants cite Shango v. Gurich, 681 F.2d 1091 (7th Cir. 1982).

Defendants' argument must be rejected. A state can create a liberty interest "by statute, by rule or regulation." Meachum v. Fano, 427 U.S. 215, 229 (1976). The Court of Appeals for this Circuit has stated that "a prisoner may have due process rights as result of entitlements

created by prison regulations . . . ." Arsberry v. Sielaff, 586 F.2d 37 (7th Cir. 1978); Stringer, supra. The court again recognized this principle in Shango, supra. There the court stated, however, that not every official pronouncement spawns a protectible right; specifically, state granted procedural rights may not in themselves create a liberty interest. Shango involved interprison transfers. The state retained total discretion to transfer inmates between institutions for any reason whatsoever. The state-created right to have a hearing regarding a transfer did not alter the state's discretion. Therefore, there was no "parent substantive right" underlying the procedural right. The analysis is different if the state provides a substantive right.

In Olim v. Wakinekona, ____ U.S. ____ (April 26, 1983), the court stated:

> . . . A state creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards of criteria guide the state's discretion" . . .

In Olim, the court cited with approval the distinctions drawn in Shango.

In Hewitt v. Helms, 103 S.Ct. 864 (1983), the court recognized the fact that a state may create a liberty interest through enactment of statutory or regulatory measures. Even though the court cautioned that not every regulation governing the administration of a prison must be treated as creating a liberty interest, the regulation at issue in that case was found to provide a

protectible interest. Similarly, the Court of Appeals for this Circuit in a decision post-dating Shango, supra, discussed an Illinois law requiring that persons receiving treatment under its Mental Health Code be treated "in the least restrictive environment." The court stated that "This is a state-created liberty interest . . . Johnson by Johnson v. Brelje, 701 F.2d 1201, 1205 (7th Cir. 1983)." Thus it is clear that if a state places limitations on official discretion, it in all likelihood has created a liberty interest.

The nature of the interest involved rather than its weight is the determining factor in a decision as to whether a liberty interest is involved. In Meacham v. Fano, 427 U.S. 215 (1976), the court determined that in the absence of a state law,

interprison transfers did not implicate a liberty interest because a prisoner's expectancy of remaining at a particular institution is "too ephemeral and insubstantial." The same approach may be appropriate in determining which regulations or laws create liberty interest. See Hewitt, supra. In the present case the interest is substantial. The state has limited the discretion of prison officials in the use of agents, the abuse of which can constitute cruel and unusual punishment. These regulations create a liberty interest. The inmates in the Wisconsin prison system have a liberty interest in not being subjected to the use of chemical agents except as set forth in the Wisconsin Administrative Code.

The question then becomes whether defendants are in fact violating their regulations. They claim that they are not. They draw fine distinctions, stating that no inmate is maced because, for instance, he refuses to return a meal tray; rather he is maced because he disobeys a direct order to return a tray which could result in "his having to be physically restrained or which could result in a physical confrontation between the inmate and correctional officers to seek compliance with orders and to coerce cooperation prior to the necessity of using actual force." They argue that if officers must enter a cell to obtain compliance with an order to return a tray, for example, there is an immediate threat of bodily injury which, under the regulations,

justifies the use of a chemical agent. The argument turns on the possibility that a seemingly passive inmate may attack officers who enter the cell and that someone may be hurt. Thus, in defendants view, the requirement is met that mace can be used only to "subdue an inmate or inmates who pose an immediate threat of bodily injury or death to another." Additionally defendants argue that because an inmate in a cell is refusing a lawful order, control over that cell is lost and mace is appropriately used "to regain control of an institution or part of an institution."

It is highly questionable whether the fact that something happen that may result in injury equals an immediate threat. It is questionable

whether when defendants act first, they can be said to be subduing an inmate. Furthermore, although the defendants state "chemical agents are a type of force," they seem, consciously or unconsciously, to consider the use of mace an alternative to "actual force." Several times in their brief this contrast becomes explicit. At page 23, defendants argue that "chemical agents, which are a substitution for force, are permitted to subdue an inmate or inmates . . . ." At page 24, reference is made to the use of mace "prior to the necessity of using actual force." This attitude, which is evident in the testimony of prison officials, is contrary to the Wisconsin prison regulations.

It might seem that in some respects a factual question exists as

to what sort of force mace is. The inmates see it as a very serious form of force. The defendants see it as a substitute for "actual force." Defendants state that "chemical agents are generally the most humane and least harmful method of dealing with obstinate and dangerous inmates . . . ." However, the decision as to what chemical agents actually are is not an open one. Wisconsin Administrative Regulation HSS 306.06(a) defines force as follows:

> "Force" is the exercise of strength or power to overcome resistance or to compel another to act or to refrain from acting in a particular way. It includes the use of chemical, mechanical, and physical power or strength. Only so much force may be used as is reasonably necessary to achieve the objective for which it is used. The use of exceasive force is forbidden.

As it should be, the use of chemical agents is included in the definition of force. The appendix to the rules further states:

> Because chemical agents pose a risk of injury to others, resort to their use is made in limited situations.

Later it is pointed out in the appendix that there is a limitation on the use of chemical agents similar to the limitation on the use of firearms:

> As with firearms, only the Superintendent may authorize its use.

Defendants' apparent attitude that chemical agents are not "actual force" is simply incorrect under either the regulations or the Eighth Amendment. Despite this, defendants in fact use mace in many cases as the first type of force used. That is, when a prisoner refuses to return a tray or to be moved, even before he makes any

physically threatening gesture or statement, he may be maced. In other words, mace is used as a "first strike" weapon.

The clear implication of the regulations is that mace is a serious use of force. For purposes of illustration, if the use of mace were analogized to hitting an inmate with a baton, the excesses in its use as revealed in this record would be apparent. No one would argue that the prison officials could tell an inmate to return a tray and then tell him that if he refused, they would hit him once with a baton; if he continued to refuse that they would continue to hit him. The flavor of corporal punishment in that scene is clear, and the regulations prohibit corporal punishment. HSS 306.06(2). Yet when mace is used, defendants seem to feel

that they are not using force at all or at least that they are being humane.

To say that they are incorrect is not to argue with them that the use of mace prevents danger to the correctional officers and is expedient. It is not to say that mace can never be used. It is not to disregard the interests of the officers in being unharmed on the job. But the regulations and the Eighth Amendment must be recognized as providing limits on the use of chemical agents. The almost routine use of chemical agents that I have observed in this case violates the inmates' rights under both the Eighth and the Fourteenth Amendments.

The order which will be issued in this case will follow in all respects the prison regulations. I will order

that in a non emergency situation[9/] the regulations be strictly complied with. Prior to the use of mace, approval of the Superintendent must be obtained. The Superintendent may delegate that authority to Mr. Heeringa, the Assistant Superintendent of Security. However, the delegation of authority must go no lower into the ranks than Mr. Heeringa. I am personally impressed with Mr. Heeringa, and I am confident that he will properly exercise his authority and good judgment. I do not have that same confidence in lower ranking

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9/Nothing in this record reveals anything about what would be done in an emergency, for no true emergencies are involved here. My order is not intended to apply to a situation in which, for instance, inmates are out of their cells, rioting, destroying property, or physically threatening correctional officers.

officers, especially those pulling long duty in the Adjustment Center.

Secondly, "to subdue an inmate who poses an immediate threat of injury" means that the inmate is at the minimum making physically threatening gestures. In some cases the throwing of items from the cells equals physically threatening gestures. Even if physically threatening gestures are made, however, if an inmate is locked in his cell, and certainly if he is locked in a strip cage, a careful judgment must be made as to whether less serious alternatives are available. Finally, "to regain control of a cell" does not mean to require an inmate to return a tray or to relinquish cigarettes or to spread his buttocks. Nor, under the case law, does it mean to force an inmate

to stop shouting. In addition, the prison officials are required to comply with the regulations to allow the medical staff to treat inmates following macing incidents.

Lastly, I come to the question of damages in Mr. Soto's individual case. While I find that his rights have been violated, I also find that the individual defendants, although acting improperly, did not do so recklessly but rather acted in good faith, believing that their actions did not run afoul of the Constitution. Accordingly, individual damages will not be awarded. The relief here will be limited to the injunction to be granted. It goes without saying, however, that a good faith immunity defense will no longer be avaliable to state agents after this decision is issued.

Findings of Fact

1. Plaintiffs are now, or at the commencement of this action were, inmates in the Adjustment Center of the Waupun Correctional Institution, Waupun, Wisconsin.

2. Defendant Elmer O. Cady was, at all times material, the Administrator of the Division of Corrections, Department of Health and Social Services, State of Wisconsin. Defendant Cady had the ultimate responsibility within the Division of Corrections for all policies, procedures, and correctional staff employed within the correctional institutions in Wisconsin, including the Waupun Correctional Institution. In May of 1983, Mr. Walter Dickey, Professor of Law of the University of Wisconsin Law School and a witness in

this case, assumed the position held by Mr. Cady.

3. Defendant Thomas R. Israel is the Superintendent of the Waupun Correctional Institution. He is responsible for all policies, procedures, and correctional staff within the institution.

4. Defendant Gerald Heeringa is Assistant Superintendent of Security of the Waupun Correctional Institution. He is responsible for all security policies and procedures within the institution.

5. The Waupun Correctional Institution is a maximum security prison in the State of Wisconsin, and at the time of trial had a population of approximately 1,154 inmates. The approved designated capacity for the Waupun Correctional Institution is 810 inmates.

6. The Adjustment Center, the major segregation center within the institution, is a concrete and steel building containing 67 cells. 59 cells are arranged in 2 tiers on the main floor. The remaining 8 cells are in the basement. Each of the cells is approximately 7 feet wide by 10 feet long by 8 feet high. Three of the sides of each cell are solid concrete. The fourth side consists of a metal barred door. The ceiling and floor are concrete. 15 of the cells have a wooden outer door in addition to the metal barred doors and are commonly referred to as double door or wooden door cells.

7. The strip cage is a thick wire mesh cage in the Adjustment Center, which is approximately 4 feet wide by 4 feet long by 8 feet high.

Strip searches of inmates are conducted in this cage.

8. The cells in the Adjustment Center do not have windows.

9. Inmates are sent to the Adjustment Center from the general population for disciplinary purposes and punishment resulting from violations of prison rules. The reasons an inmate may be sent to the Adjustment Center range from possession of contraband, theft, refusing to go to work, up to fighting with prisoners or staff.

10. Inmates are normally allowed to have cigarettes and matches in the Adjustment Center. Inmates are fed in the Adjustment Center 3 times a day. The meals are delivered by correctional officers on plastic trays and are served to the inmates while

they are locked in their cells. Plastic eating utensils and paper cups are provided.

11. The average daily population in the 59 cells of the justment Center since approximately the summer of 1982, is 80 inmates. Inmates are frequently double-celled in the Adjustment Center and, in fact, more than two inmates have been placed in an Adjustment Center cell on a frequent basis during the last three years. At times, over 100 inmates have been held in the Adjustment Center.

12. The chemical agents presently used in the Adjustment Center are Chloroacetenophenone (CN) and Chlorobenzylmalononitrite (CS).

13. The CN used in the Adjustment Center is in a liquid form, and is a

by-product of a kerosene-type substance which makes the CN stick to surfaces and persist. CN is sprayed from a canister. The canisters used in the Adjustment Center are pproximately 2 inches in diameter, and about 5-1/2 inches high. They contain approximately 4-1/2 ounces of CN, which is equivalent to approximately 35 1-second bursts of CN. CN vaporizes upon contact with the human body and other surfaces.

14. Mace is a brand name used by one of the manufacturer of the CN which is available in the Adjustment Center.

15. CS is a stronger chemical agent than CN. CS is used in a powder or dust form and is often referred to as Federal Duster. CS dust is also disbursed from a canister.

16. A liquid form of CS was also used in the Adjustment Center during the period relevant to the lawsuit. The liquid form of CS, often called Federal Streamer, is no longer used in the Adjustment Center.

17. CN and CS are intended to have the immediate effect of disabling and incapacitating persons on whom they are discharged by causing pain and an intense and pervasive burning and tearing action.

18. The application and use of CN and CS may result in serious and permanent physical injury, especially to the eyes and skin, in the absence of immediate and competent medical attention.

19. The effects of CN and CS may be moderated by thoroughly cleansing and bathing the body, changing clothing and bedding, and ventilating the affected area.

20. The use of chemical agents in the Adjustment Center has increased dramatically in the past 4-1/2 years.

21. From January 1, 1979 to November 4, 1982, approximately 130 macing incidents occurred in the Adjustment Center.

22. Most of the macing incidents involve situations where inmates were maced while locked in their cells or in the strip cage. Some incidents involved inmates who suffered the effects of mace used on another inmate.

23. "Macing Incident Reports" are written by correctional officers and are intended to contain most of the relevant information regarding the use of chemical agents on a particular occasion.

24. The defendants' policy concerning the use of mace in the Adjustment Center hasn't changed since

the filing of the lawsuit or the rendering of the summary judgment decision in February of 1982.

25. Many states operate their prisons without the use of mace or chemical agents, except in extreme riotous situations.

26. The policy concerning the use of mace in the Adjustment Center was set by defendant Heeringa, and approved by defendants Israel and Cady.

27. The possibility of serious injury as a result of the use of chemical agents is greater when chemical agents are used in enclosed, poorly-ventilated areas such as a prison cell.

28. The first document issued by the Division of Corrections, Department of Health and Social Services, on the use of chemical

agents was placed into effect on January 15, 1978, and stated that,

> Chemical agents for purposes of security and control shall be used only in extra-ordinary circumstances when a situation arises in which physical force would be otherwise necessary and unavoidable to protect residents or staff from great bodily harm. (Emphasis added.) Ex. 136.

29. Most of the inmates who are placed in the Adjustment Center are respectful to officers, do their adjustment time and are returned to the general population.

30. Correctional officers have discretion to ignore some of the conduct of inmates in the Adjustment Center without taking disciplinary action.

31. Some methods of dealing with inmate misconduct are to take a

portion of the inmate's property away or to increase his adjustment time.

32. The most frequent kind of major conduct violations in the Adjustment Center are disrespect and disobeying orders.

33. The authority to approve the use of chemical agents in the Adjustment Center has been delegated by defendants to the lowest supervisory level.

34. Defendants' procedures for the use of chemical agents in the Adjustment Center do not require that the officer in charge create a show of force by gathering other correctional officers an suiting them up in Emergency Response Unit (E.R.U.) gear before chemical agents are used.

35. The E.R.U. gear includes a helmet with faceguard, a 4-1/2 foot high, 2-man plastic shield, leg

guards, supporter, jump suit and a wooden baton. This equipment is available for several of the guards in the Adjustment Center.

36. Defendants' policy in the Adjustment Center requires that chemical agents be used first against an inmate for refusing to obey an order. After the use of chemical agents, officers enter the cell dressed in E.R.U. gear.

37. The cells in the Adjustment Center are not cleaned after mace is used against the inmate while he was in that cell, except in the discretion of the supervisor present. In the Ajustment Center, decisions whether to allow inmates to shower or to change clothing and bedding after the use of chemical agents are also left to the discretion of the supervisor.

38. Chemical agents have been used to create and preserve an atmosphere of discipline in the Adjustment Center.

39. Chemical agents have been used in the Adjustment Center to gain compliance with non-emergency orders when the inmates against whom the agents are used are locked in their cells, handcuffed, or otherwise restrained.

40. Chemical agents have been used to seek compliance with an order to stop yelling obscenities.

41. Chemical agents have been used in the Adjustment Center against inmates who refuse orders to take medication.

42. Chemical agents have been used in the Adjustment Center against inmates who refuse an order to stop throwing liquids from their cells.

43. Chemical agents have been used in the Adjustment Center against an inmate for refusing to remove a book from the outer wooden door of an adjustment cell.

44. Inmate Robert Mallory was directly maced, in the eyes, on February 4, 1981, while he was passive and locked in his cell, for refusing to return his plastic meal tray. Instead of returning the tray, he placed it on his bed, went to the back of the cell and sat on the toilet or sink. He was not violent, made no threats against any of the guards, had no weapons and was not barricaded in his cell.

45. On February 5, 1981, Mallory followed the same pattern of conduct as on February 4, 1981. However, instead of macing Mallory on that

date, several of the guards entered his cell dressed in E.R.U. equipment and retrieved the tray from the cell.

46. Inmate Mallory suffered the effects of mace as a result of the use of chemical agents against other inmates in the Adjustment Center, including April 16, 1980, when another inmate was sprayed with 4 cans of mace.

47. Inmate William McAdoo was directly maced on October 11, 1980, while he was passive and locked in his cell, for throwing some milk from a paper cup on a correctional officer. Inmate McAdoo was not violent, did not issue any threats against any correctional officers, had no weapons and was not barricaded in his cell.

48. Inmate McAdoo was not given a shower and the water in his cell was turned off for a period of time after the macing incident, preventing him

from ridding himself of the effects of mace.

49. On other occasions while inmate McAdoo was in the Adjustment Center, he suffered the effects of mace and chemical agents when they were used against other inmates.

50. Inmate Gregory Johnson is an asthmatic. He was never directly maced while in the Adjustment Center. However, on several occasions he suffered the effects of mace when it was sprayed against other inmates, including inmate Warren Washington on March 8, 1981.

51. Inmate Laron McKinley was maced on November 24, 1980, while he was passive and locked in one of the double-doored adjustment cells. On that date, he was maced for refusing to remove a book from the outer wooden door of the cell. The inner metal barred door was locked at all times.

Inmate McKinley did not issue any threats against any correctional officers, did not possess any weapons in his cell, and was not barricaded in his cell.

52. Inmate McKinley was also maced on September 26, 1980, while locked in the strip cage. On that date, he was maced for refusing to spread his buttocks to complete a strip search procedure. At the time he was maced, McKinley was naked and had no weapons.

53. On other occasions, inmate McKinley suffered the effects of mace while he was in the Adjustment Center when mace was sprayed on other inmates.

54. Inmate Carlos Soto was maced on December 13, 1979, while locked in his cell and handcuffed. Inmate Soto was maced for refusing to double-cell with another inmate.

55. On other occasions while in the Adjustment Center, Soto suffered the effects of mace when it was sprayed against other inmates.

56. On various occasions, members of the plaintiffs' class suffered the effect of chemical agents but were denied medical treatment, an opportunity to shower or bathe, an opportunity to have the cell cleaned and ventilated, and to have their clothes, bedding, and mattress changed.

57. As a direct result of the conduct, policies and procedures of defendants and their agents and subordinates, inmates have suffered and will continue to suffer irreparable harm. Plaintiffs have been without and will continue to be without an adequate remedy at law. The balance of harms favors plaintiffs, and public policy requires that relief be granted to them.

Conclusions of Law

1. This action arises under the United States Constitution, particularly under the provisions of the Eighth and Fourteenth Amendments to the United States Constitution, and under federal law, particularly the Civil Rights Act, Title 42 of the United States Code, §1983.

2. This court has jurisdiction pursuant to Title 28 of the United States Code, §1343(3).

3. This action is certified as a class action on behalf of all past, present and future residents of the Adjustment Center at the Waupun Correctional Institution.

4. The Waupun Correctional Institution, including the Adjustment Center, is being operated and

maintained by defendants pursuant to state law.

5. At all times relevant to this action, the defendants were acting under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Wisconsin, and under the authority of their offices.

6. All of the defendants and their subordinates and agents are bound by the Wisconsin Administrative regulations, including HSS §306.08.

7. During the times relevant to this action, defendants and their subordinates and agents have used chemical agents in the Adjustment Center against the plaintiffs in violation of plaintiffs' constitutional rights under the Eighth Amendment.

8. During the times relevant to this action, defendants and their subordinates and agents have used chemical agents in the Adjustment Center against plaintiffs in violation of plaintiffs' constitutional rights under the Fourteenth Amendment to the Constitution by using chemical agents in violation of the Wisconsin Administrative regulations - HSS §306.08.

INJUNCTIVE ORDER

The court finds that defendants, their agents, employees and subordinates have used or permitted the use of and are continuing to use or permit the use of chemical agents, including CN and CS, in the Adjustment Center of the Waupun Correctional Institution under circumstances which constitute cruel and unusual punishment to the plaintiffs in violation of the Eighth Amendment to the United States Constitution; that such use also has been and continues to be in violation of the administrative regulations of the State of Wisconsin, Department of Health and Social Services, specifically HSS 306.08, and that such use has been and continues to be in

violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; that plaintiffs have been and are continuing to be harmed, and the public interest and the equities of the situation require that the court now take action to permanently enjoin the defendants' wrongful conduct;

NOW, THEREFORE, IT IS ORDERED WITH RESPECT TO THE USE OF CHEMICAL AGENTS IN THE ADJUSTMENT CENTER OF THE WAUPUN CORRECTIONAL INSTITUTION:

1. Unless actual physical control of all or a portion of the institution has been lost, chemical agents, including CN and CS, may not be used except to subdue an inmate or inmates who pose a clear, immediate, actual and direct threat of bodily injury or death to another. Chemical agents may not be used:

(a) as an ordinary procedure or other than in extreme and exceptional cases;

(b) to control an inmate who is not violent unless the threat of violence is clear, immediate, actual and direct;

(c) to control an inmate who is locked in his cell, unless there is a clear, immediate, direct and actual threat of bodily injury or death to another;

(d) to control an inmate who is handcuffed or otherwise restrained unless there is a clear, immediate, direct and actual threat of great bodily injury or death to another.

2. The use of chemical agents is not appropriate to force an inmate's compliance with a non-emergency order where the inmate's refusal to obey the order is passive and non-violent. The mere possibility of a physical confrontation and the potential of resulting bodily injury, absent a clear, immediate, direct and actual threat of bodily injury is insufficient to justify the use of

chemical agents. It will ordinarily not be proper to use chemical agents in the following circumstances:

(a) when an inmate refuses to return a meal tray, cup, dishes or other eating articles; a refusal to return such an item, however, justifies the withholding of future food services to the inmate;

(b) when an inmate refuses to return contraband, such as cigarettes, unless it is contraband which may reasonably be considered, in its present form, to be a weapon;

(c) when an inmate throws an object, such as food, water, urine or feces, out of his cell;

(d) to quiet a prisoner;

(e) when an inmate refuses non-emergency medical treatment;

(f) when an inmate refuses to leave his cell to have it cleaned; and

(g) when an inmate refuses to spread his buttocks for a search in the strip cage where such refusal is passive and non-violent.

3. Chemical agents may never be used against an inmate if he is passive and non-violent.

4. Chemical agents may never be used to punish an inmate.

5. Whenever circumstances are such that the use of chemical agents is proper, the person authorizing their use shall give full consideration to the alternative use of other means of non-deadly force.

6. The use of chemical agents in non-emergency circumstances shall be

authorized only by Mr. Israel or Mr. Heeringa.

7. Chemical agents shall not be used in amounts greater than necesaary.

8. Chemical agents are to be used in accordance with the manufacturer's instructions.

9. Following each use of a chemical agent, all exposed inmates shall be examined by a competently trained member of the medical staff.

10. This ORDER regarding the use of chemical agents in the Adjustment Center of the Waupun Correctional Institution is to be in addition to those restrictions already set forth in HSS 306.08. Nothing herein should be construed to relieve any person of an obligation to fully, completely and in good faith comply with and implement all administrative procedures promulgated by the Division

of Corrections, Department of Health and Social Services, State of Wisconsin, regarding the use of chemical agents to the extent they are not inconsistent with this ORDER.

Dated at Milwaukee, Wisconsin, this 29th day of June, 1983.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

3985p/02-03-85

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CARLOS S. SOTO, et al.,

[June 29, 1983]

Plaintiffs,

vs.

Docket No. 80-C-146

ELMER O. CADY, et al.,

Judge Terence T. Evans

Defendants.

DECISION BY COURT

This action came to trial before the Court with the judge named above presiding. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That in non-emergency situations, chemical agents in the adjustment center of Waupun Correctional Institution be used only in accordance with the procedures outlined on pages 31 through 34 of the decision and order dated June 29, 1983.

Dated: 6/29/83

SOFRON B. NEDILSKY, Clerk

By /s/ Regina Torcura

Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CARLOS S. SOTO and
ROBERT DE MALLORY, on
behalf of themselves and
all others similarly
situated,

Plaintiffs,

vs. Civil Action
No. 80-C-146

ELMER O. CADY
THOMAS R. ISRAEL and
GERALD HEERINGA,

Defendants.

[February 22, 1982]

DECISION AND ORDER

This is an action under 42 U.S.C. §1983, filed pro se by plaintiffs Carlos S. Soto and Robert DeMallory, alleging that defendants violated their constitutional rights under the Eighth and Fourteenth Amendments through the arbitrary, capricious, and excessive use of mace, tear gas, and

other chemical disabling agents in the Adjustment Center at the Wisconsin State Prison at Waupun. On July 7, 1980, Attorney Peter Stone was appointed to represent the plaintiffs, and on September 11, 1981, an amended complaint was filed. On February 12, 1981, the case was certified as a class action. Plaintiffs have now moved for summary judgment granting a permanent injunction or, alternatively, a preliminary injunction.

Plaintiffs seek an injunction (1) prohibiting prison authorities from using any chemical disabling agents, other than mace and canister-type dust, in the Adjustment Center, (2) restricting the use of mace and other chemical agents, and (3) requiring that any resident exposed to a disabling agent be allowed to cleanse

his eyes and body and air his cell after exposure.

In support of the motion, plaintiffs have submitted numerous affidavits from prisoners alleging various macing incidents. In addition, the affidavit of Mr. Stone sets forth actual prison documents -- Incident Reports of macing incidents. The Incident Reports were prepared by various prison officers after macings had occurred. Taken together, plaintiffs argue, the documents reveal that the practices of the prison officers are in violation of the constitution and of Wisconsin prison regulations governing the use of chemical substances. In response, defendants present numerous affidavits from officers as well as higher level officials regarding both the need, as they see it, for the use of mace in

general and further statements about the specific incidents reflected in the plaintiffs' affidavits.

The affidavits of the prisoners paint a picture of the use of mace at the Adjustment Center that differs substantially from the situation as portrayed by the defendants. DeMallory, for example, states that because his request for the return of some personal property, including his radio and typewriter, was denied, he placed his meal tray on his bed rather than at the front of his cell. For this, claims DeMallory, he was maced.

The affidavit of Robert Lee Barnes states that he was maced without provocation merely because he was about to be transferred to another correctional institution. The affidavit of Laron McKinley states that he was maced for refusing to

remove a book from the outer wooden door of his cell. The affidavit of Filemon Amaro states that approximately 5 or 6 cans of mace were used against him while he was locked in his cell. The affidavit of Paul Chapman states that mace was blown over the entire cell block in the Adjustment Center by a fan in order to test its effects. The affidavit of Warren Washington states that he was maced for refusing to give up his plastic evening meal tray and that he was maced in the face while he was naked and handcuffed in a "strip cage." The affidavit of plaintiff Soto states that after he placed his hands through the bars to be handcuffed he was maced.

All of the prisoner affidavits state that injuries were received as a result of the macings, including, most

significantly, burning of the eyes, temporary loss of sight and difficulty with breathing.

In sum, the affidavits of the prisoners attempt to show that mace was used against them by the defendants without adequate provocation in circumstances under which the inmates presented no threat to human life or to the destruction of prison property. The affidavits, plaintiffs argue, also support their contention that excessive amounts of mace were used as a means of summary punishment.

The defendants argue that their affidavits raise genuine issues of fact, thus precluding a grant of summary judgment against them. They also contend that their affidavits demonstrate that the use of mace in the Adjustment Center is within

constitutionally permissible limitations.

Summary judgment is inappropriate if material facts are in dispute. All inferences and doubts drawn from the facts in the record must be viewed in the light most favorable to the party opposing the motion. Staren v. American National Bank & Trust Co. of Chicago, 529 F.2d 1257 (7th Cir. 1976). The extent, provocations and justifications for the macing incidents, as disclosed in the affidavits, are in dispute. Thus, the request for summary judgment permanently enjoining the defendants from using mace and other chemical disabling agents cannot be granted.

The plaintiffs' remaining request is for a preliminary injunction enjoining, within certain limitations, the use of mace and other chemically

disabling agents during the pendency of this suit. Included in this request are the plaintiffs' objections to what they see as inadequate medical attention following macing incidents.

In this circuit, a preliminary injunction will be granted where the following requirements have been satisfied:

> "(1) the plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendant; (3) the plaintiffs have at least a reasonably likelihood of success on the merits; and (4) the granting of a preliminary injunction will not disserve the public interest." Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc., 545 F.2d 1096, 1097 (7th Cir. 1976).

All four requirements must be met.

In reviewing the request for preliminary injunctive relief, I am again confronted with the contradictory affidavits. I can, in part, resolve that concern by relying only on the official "Incident Reports" -- which come from the defendants' own records and are written by prison employees -- and the affidavits presented by the defendants.

Relying solely on this material, I find that plaintiffs have shown that they are likely to succeed on their claim that at least some of the macing incidents are unconstitutional. However, in my view, the granting of a preliminary injunction may more seriously harm defendants than plaintiffs and, in this circumstance, granting an injunction would not serve the public interest.

The state has regulations governing the use of mace in its prisons. As written, the regulations are constitutional. If properly interpreted and followed, the regulations would protect prisoners from unconstitutional macings as effectively as an injunction. In my view, plaintiffs' proof at trial is likely to show that defendants do not follow those regulations. However, if I were to issue a preliminary injunction, I would be doing no more that enjoining defendants to follow their own regulations.

That sort of order would be both somewhat absurd and possibly harmful to the administration of the prison. Federal courts have followed a strong, well-established policy of avoiding unnecessary interference with internal prison administration. For that

reason and because the state administrative regulations exhibit a sensitivity to constitutional requirements, I will not preliminarily enjoin defendants, but will admonish them to look more closely at their regulations and the case law discussed below. In addition, I will expedite a final determination in this case.

The Incident Reports and the affidavits of the defendants show that macing incidents generally fall into four somewhat overlapping categories: refusals of inmates to come to the front of their cells to be handcuffed; refusal to submit to strip searches; refusal to relinquish items from cells; and incidents of yelling and throwing food, liquids, etc.

Thirty-nine Incident Reports written by prison officers are attached to Mr. Stone's affidavit. Of

those, approximately 17 involve macings primarily in response to an inmate's refusal to come to the front of his cell to be handcuffed. Because inmates in the Adjustment Center are considered dangerous, they are handcuffed before their cells are opened. The usual procedure is that an officer tells an inmate to come to the bars to be handcuffed. If the inmate refuses, what is referred to as a "direct order" is given to the inmate. If that order is disobeyed, the inmate is maced. Ordinarily, following the macing, the inmate complies with the request. For example, Exhibit 11, attached to the Stone affidavit, states:

> "On the above date and time, Inmate Cone #60840-A was ordered to be placed in full Observation in the Health Services Unit by Dr. Arneson. Inmate

Cone refused to leave his cell, AC Cell #5. I then ordered him to come to the bars to be moved to HSU and he refused. I then discharged a one second burst of mace at Inmate Cone striking him in the chest area. . . ."

From time to time, one burst of mace does not induce compliance with an order. Exhibit 1 includes the following statement:

"On above date and time I was called to the A.C. after Sgt. Strelow notified me that Johnson #544857 had refused several direct orders to come up to his bars to be cuffed so that his cell could be cleaned. When I arrived at the A.C. I proceeded to Johnson's cell and again issued him a direct order to come up to his bars which he still refused. I then informed Johnson that if he did not comply with the order we would use Mace, still receiving no response from Johnson. At this time the proper procedure was followed and Mace was administered. After

several minutes had passed Johnson still would not come up to his bars. CS Dust was then used with two one-second bursts being sprayed into the air. After waiting several minutes with Johnson's cell door closed it was reopened but Johnson still refused to come up to the bars. The above named Officers who were already suited up in full Crowd Control Gear were instructed to enter the cell. A struggle occurred at this time with Johnson finally being cuffed and removed to the shower . . . ."

Approximately eight reports show that a similar pattern occurs when inmates refuse to submit to strip searches. Exhibit 2 reveals the following:

"On above date and approximate time, Inmate Broadie #7621-A was transferred from Program Status to Adjustment Status and refused to comply with a direct order of being strip shook (sic). I explained to Broadie

> that if he did not comply with the direct order, I would spray him with mace. Broadie still refused the order. I instructed four officers to suit up into Crowd Control equipment and proceeded to Cell #4. I did use a small amount of mace on Broadie. After approximately five minutes, Broadie came to the bars and was cuffed and taken to Cell 14 where he complied to a strip search . . . ."

The incidents involving the inmates' failure to relinquish items from their cells show the same pattern. On February 17, 1981, Inmate John Schwartz was maced for refusal to relinquish a ring. Exhibit 7. On April 29, 1980, Inmate Roger Tubbs was maced for failure to give up his cigarettes. Exhibit 20. Three incidents are reported in which inmates were maced for failure to give back the plastic tray on which their

food is served. Exhibits 5, 9, 10.

For example, Exhibit 5 contains the following statement:

> "Off. Kluza was picking up noon meal trays and Inmate Washington refused to give out his tray. I went down and talked with Washington but he still refused to give out the tray. I gave Washington a direct order to hand out his tray, this he also refused. I notified the Security Officer and Lt. Steckbauer entered the block at 12:10 P.M. to supervise. Off. Kluza, Hoekstra and V. Nelson suited up in riot gear; Lt. Steckbauer issued me (Sgt. Strelow) a canister of mace, and supervised the application of it.
>
> "Inmate Washington was again given a direct order to come to the front of his cell to be cuffed or to hand out his food tray. Washington refused all direct orders. I informed Washington that mace would be used if he refused these orders. Washington still refused, mace was then applied . . . ."

Finally, a smaller number of incidents are reported in which the inmates were throwing food or liquids at the officers or in which they were causing disruption by shouting. For instance, Exhibit 21 reveals:

> "On the above time and date, I was informed there was a problem at the Adjustment Center. Upon arrival there was a great deal of noise and bar rattling by inmates. Sgt. Hills informed me inmate Amaro, #59227-A, for no reason, started yelling and threatening staff. I went over to Amaro's cell and tried talking to him but with no avail, and all the while Amaro kept on pacing, with hands above his head yelling kill-kill. I gave Amaro several direct orders to come to the front of the cell, without any response from him except his repeated yelling of kill. Chemical mace was then applied with no change. Amaro still kept yelling and disrupting the Adjustment Center.

> Permission was obtained from Capt. H. McLaughlin to use the Silent Partner, Federal Streamer, which also had no effect on Amaro. Three officers were then informed to dress in Riot Gear, and inmate was physically taken from his cell to Control, Full Restraints. Amaro continually struggled and kept on yelling, kill, kill everyone."

The incident reported which involves the most disruptive behavior is revealed in Exhibit 23. Several inmates were yelling "We want to go to the hole, we want to go to the hole." An officer on the cell block reported that five inmates had thrown liquid at him. It was determined that some of the inmates would have to be removed:

> ". . . Residents Bell, Jordan and Killebrew caused no problems in the transfer, however, Bowie threw a pail of liquid at me as I passed his cell and then began

yelling disrespectful
and threatening
statements at me.

"Wiggins refused several
direct orders to come to
the bars of his cell to
be handcuffed. It then
became necessary to use
chemical mace on him.
The effects of the mace
were immediate in that
he came up to the bars
very quickly, was
cuffed and transferred
to Cell 11, Controlled
Status . . . ."

The record also contains the affidavits of Elmer O. Cady, Administrator of the Division of Corrections of the State of Wisconsin, and Gerald Heerings, Assistant Superintendent of Security at Waupun Correctional Institution. Mr. Cady points out that the inmates at the Adjustment Center are the "most aggresive, assaultive, and disruptive types in the institution." In his view, control of the Adjustment Center is "absolutely vital to the overall

operation of Waupun Correctional Institution." He also states that repeated failure of inmates to obey ligitimate orders would result in a critical breakdown of order and discipline. If an inmate repeatedly refuses an order,

> "and the officers and supervisors believe there is reasonable concern that the use of physical force would result in injury, a decision may be made to use mace to reduce the inmate's resistance so that restraints may be placed on him. Without the use of chemical agents, it would be necessary for officers to enter the cell and forcibly cuff the inmate."

On this point, Mr. Heeringa states:

> "Failure to comply with an order which requires physical force to secure compliance, under supervision by security supervisory staff members is considered a legitimate justification for the use of chemical

agents to avoid injury to both inmates and staff."

Both Cady and Heeringa claim that the use of mace at the Adjustment Center complies with the regulations pertaining to the use of chemical agents found in 4 Wisconsin Administrative Code, HSS § 306.08.

The court of appeals for this circuit has addressed the questions posed by the use of chemical agents in correctional facilities in two recent cases. In Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980), the court pointed out that while courts in the past have sanctioned the use of chemical agents when reasonably necessary, recent decisions have "emphasized that use of chemical agents such as tear gas and mace by prison officials to subdue individual prisoners, rather than to

quell large distrubances, should be more restricted." At 999.

In Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981), the court considered the use of tear gas and other chemical disabling agents on pretrial detainees. Thus, the analysis proceeded under the Fourteenth, not the Eighth, Amendment. However, the court implied that the issues posed were the same. Relying on Stringer and Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979), the court concluded that only in "rare occasions" would it be appropriate to use chemical agents to control inmates already confined in their cells. In Lock, the records show that the inmates were engaged in "inciting to riot at a time of tremendous tension in the prison following an attempted escape and the taking hostage of the prison Warden

and several others." The court concluded:

> "We believe that the facts shown regarding this incident constitute one of the rare occasions when use of tear gas against persons locked in cells was not unjustified." At 496.

However, as to other incidents revealed in the court record, the conclusion was contrary. The use of gas to retrieve a metal food tray was found to be constitutionally impermissible. Also impermissible was the use of a chemical agent to stop inmates from shouting and uttering threats. The court stated, at page 500:

> "We have also found unconstitutional the use of chemical agents to stop unpleasant but not threatening behavior by safekeepers locked in their cells."

It is a short step from these cases to the conclusion that the Incident Reports in the record may, in some instances, reveal that mace is employed in a manner not sanctioned by the Eighth Amendment to the Constitution. As I stated above, those same Incident Reports tend to show violations of the state regulations found in 4 Wisconsin Administrative Code, HSS § 306.08. The regulations provide for the use of chemical agents in only two situations: to subdue an inmate who poses an immediate threat of injury or death to another, and to regain control of an institution or part of an institution. Defendants seem to interpret the regulations to authorize the use of mace on an inmate who is locked in a single cell and refuses to obey a routine non-emergency order.

On its face, that interpretation of the regulation may be too broad. A proper interpretation of the regulation would seem to limit the use of mace unless prison authorities can demonstrate that immediate compliance with a direct order is necessary, and that compliance with the order can only be secured by entering the cell and engaging in physically violent contact with the inmate where, in all likelihood, a prison official or the inmate himself will be injured.

The regulations, to be constitutional, must be interpreted to limit the use of mace to extreme situations. They must recognize that the use of mace to subdue individual prisoners in single cells (as opposed to quelling larger disturbances), must be "more restricted." Stringer, supra at 999.

Furthermore, the regulations contain a built-in safe-guard to prevent abuses: any use of chemical agents must be authorized by the Superintendent, a requirement I interpret to apply to each macing incident. By using the term "superintendent" in the regulations, the intent appears to be to vest the power to authorize macings in one high-ranking official. In this case, I would interpret the term to include both Mr. Thomas Israel and, perhaps more appropriately, Mr. Heerings, the "Assistant Superintendent - Security" at the Waupun Correctional Institution. I also interpret the regulations to mean that if Mr. Heeringa is unavailable, use of chemical agents must be authorized by someone of relatively responsible rank outside the Adjustment Center who is

specifically designated by Mr. Heeringa or Mr. Israel.

As I stated, however, I find that the issuance of an injunction may seriously harm the defendants' interest and duty in maintaining order in the institution and may, as a result, disserve the public interest. The affidavits of Cady and Heeringa state that without the use of chemical agents it would be much more dangerous to force compliance with legitimate orders, with the result being a breakdown of order and discipline in the entire prison. I believe these concerns to be legitimate.

The Adjustment Center at the Wisconsin State prison is reserved for inmates who pose disciplinary problems while among the general population. Unfortunately, placement in the Center does not deter some inmates from

engaging in prohibited conduct. In some instances, guards in the Center become the object of an inmate's frustrations both real and imagined. A prison cannot be run by stubborn, defiant inmates, but rather it must be run by state officials lawfully entrusted with the responsibility for administering a reasonably safe and orderly institution. Because of the serious and difficult tasks faced by defendants to this action, I am convinced that the public interest is served by allowing them time to reevaluate their interpretation of their regulations before being faced with a federal court order.

Plaintiffs also seek an order requiring defendants to provide immediate medical attention to inmates exposed to chemical agents and to allow them to bathe or shower, change

their clothing, and ventilate their cells. On this point, a direct dispute appears in the facts presented to the court. Plaintiffs all claim, in almost identical language, that they were denied medical treatment, showers or baths, changes of clothing, and ventilation. Defendants all state that medical attention is always given, and that water is available for cleansing.

Again a regulation speaks to the issue. Regulation HSS 306.08(5) provides:

> "After chemical agents have been used, all exposed inmates are to be examined by the medical staff. These inmates shall have their eyes cleaned with water and be provided with a change of clothing as soon as possible. Exposed living quarters shall have bedding and mattress changes and a thorough cleansing."

The regulation is clear. If followed, it provides protection to the inmates.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment permanently or temporarily enjoining the defendants is denied.

IT IS FURTHER ORDERED that counsel for each side appear for a conference with the court on April 22, 1982, at 9:30 a.m. to consider further proceedings in this case.

SO ORDERED.

Dated at Milwaukee, Wisconsin, this 22nd day of February, 1982.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

Opinion by Judge Kellam
JUDGMENT-ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1984

Before

Hon. Joel M. Flaum, Circuit Judge

Hon. Wilber F. Pell, Jr., Senior Circuit Judge

Hon. Richard B. Kellam, Senior District Judge*

No. 83-2380

CARLOS S. SOTO and ROBERT DE MALLORY, individually and on behalf of all others similarly situated, Plaintiffs-Appellees	Appeals from the United States District Court for the Eastern District of Wisconsin
vs.	
ELMER CADY, Administrator of Corrections Thomas Israel, Superintendent, State Prison GERALD HEERINGA, Security Superintendent, State Prison, Defendants-Appellants.	No. 80-C-146 Terence T. Evans, Judge.

No. 83-2381

CARLOS S. SOTO, Plaintiff-Appellee,

No. 80-C-321

vs.

ELMER O. CADY, et al., Defendants-Appellants.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, in accordance with the opinion of this Court filed this date.

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*The Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 2, 1984

Before

Hon. Joel M. Flaum, Circuit Judge

Hon. Wilber F. Pell, Jr., Senior Circuit Judge

Hon. Richard B. Kellam, Senior District Judge*

No. 83-2380, 83-2381

CARLOS S. SOTO and ROBERT DE MALLORY, on behalf of themselves and others similarly situated, Plaintiffs-Appellees	Appeal from the United States District Court for the Eastern District of Wisconsin
vs.	
WALTER J. DICKEY, DONALD CLUSEN and GERALD HEERINGA, Defendants-Appellants.	No. 80-C-146, 80-C-321 Terence T. Evans, Judge

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CARLOS S. SOTO and ROBERT DE MALLORY, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

vs.

WALTER J. DICKEY, DONALD CLUSEN, and GERALD HEERINGS,
Defendants-Appellants.

The slip opinion in the above-entitled cause decided September 20, 1984, is amended as follows:

Footnote 4 on page 10 is deleted. Footnotes 5 and 6 on page 11 thus become footnotes 4 and 5, respectively, footnote 7 on page 15 becomes footnote 6, and footnote 8 on page 20 becomes footnote 7.

Nos. 83-2380, 83-2381

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable Richard J. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

4 Wis. Admin. Code HSS 306.01

HSS 306.01 Applicability and purpose. (1) Pursuant to authority vested in the department of health and social services by s. 227.014 (2), Stats., the department adopts this chapter which applies to the department, division to participate in activities within a secure surrounding that may assist them in a successful reintegration into the community.

4 Wis. Admin. Code HSS 306.03

HSS 306.03 Security policy. Primary security objectives of the division of corrections are to protect the public, staff, and inmates and to afford inmates the opportunity to participate in a safe setting in activities that equip them to be successfully reintegrated into the community.

4 Wis. Admin. Code HSS 306.06

HSS 306.06 Use of force. (1) In this chapter, the following definitions apply:

(a) "Force" is the exercise of strength or power to overcome resistance or to compel another to act or to refrain from acting in a particular way. It includes the use of chemical, mechanical, and physical power or strength. Only so much force may be used as is reasonably necessary to achieve the objective for which it is used. The use of excessive force is forbidden.

(b) "Non-deadly force" is force which the u er reasonably believes will not create a substantial risk of causing death or great bodily injury to another.

(c) "Deadly force" is force which the user reasonably believes will

create a substantial risk of causing death or great bodily injury to another.

(d) "Bodily injury" means physical pain or injury, illness, or any impairment of physical condition.

(e) "Great bodily injury" is bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

(f) "Reasonably believes" means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous.

(2) Corporal punishment of inmates is forbidden.

(3) Non-deadly force may be used by correctional staff against inmates only if the user of force reasonably believes it is immediately necessary to realize one of the following purposes:

(a) To prevent death or bodily injury to oneself or another;

(b) To prevent unlawful damage to property that may result in death or bodily injury to oneself or another;

(c) To regain control of an institution or part of an institution after an inmate takeover;

(d) To prevent the escape of an inmate from an institution;

(e) To apprehend an inmate who has excaped from an institution;

(f) To change the location of an inmate; or

(f)(sic) To prevent unlawful damage to property.

(4) Deadly force may be used:

(a) For the purposes stated in sub. (3) (a)-(c);

(b) To prevent escape and apprehend an escapee from a maximum or medium security institution; or

(c) To prevent escape from a minimum security institution if the user reasonably believes that there is a substantial risk that a person escaping will cause death or bodily harm to another unless immediately apprehended.

(5) Deadly force may not be used if its use creates a substantial danger of harm to innocent third parties, unless the danger created by not using such force is greater than the danger created by using it.

4 Wis. Admin. Code 306.08 [effective through November 1, 1984]

HSS 306.08 Use of chemical agents. (1) Chemical agents may be used only as follows:

(a) To subdue an inmate or inmates who pose an immediate threat of bodily injury or death to another; or

(b) To regain control of an institution or part of an institution.

(2) In confined or close areas, only CN and CS chemical agents and cannister dust chemical agents may be used. In all respects, the manufacturer's safety instructions shall be followed.

(3) Tear gas grenades, projectiles, pepper foggers, and riot shells may only be used in outside areas and large enclosed areas in which the danger due to a reduction in oxygen is minimal.

(4) The use of chemical agents shall be authorized only by the

superintendent. It may only be discharged by a correctional officer supervisor or by a trained staff member under the immediate supervision of such a supervisor. Each institution shall insure that every staff member authorized to use chemical agents is properly trained in its use.

(5) After chemical agents have been used, all exposed inmates are to be examined by the medical staff. These inmates shall have their eyes cleaned with water and be provided with a change of clothing as soon as possible. Exposed living quarters shall have bedding and mattress changes and a thorough cleaning.

(6) Whenever a chemical agent has been used, an incident report shall be submitted to the director of the bureau of institutions.

4 Wis. Admin. Code 306.08 [as amended effective November 1, 1984]

HSS 306.08 Use of chemical agents. (1) Definitions. In this section: (a) "Chemical agent" means CN or CS or a comparable incapacitating agent in a form which includes, but is not limited to, a tear gas grenade, projectile, pepper fogger, riot shell, or cannister.

(b) "CN" means chloroacetophenone.

(c) "CS" means O-chlorobenzyl malononitrile.

(2) Regulation. The use of a chemical agent is a form of non-deadly force and is regulated by this section.

(3) Emergency Situations. Chemical agents may be used when necessary in the following emergency situations:

(a) To prevent imminent escape;

(b) To subdue an inmate who poses an immediate threat of bodily injury or death to self or someone else; or

(c) To regain control of all or part of an institution during a disturbance as defined in s. HSS 306.22(1), or an emergency as defined in s. HSS 306.23(1).

(4) Nonemergency situations. (a) To deal with situations other than those described in sub. (3), chemical agents may only be used where s. HSS 306.06(3) permits the use of force and the inmate physically threatens to use immediate physical force, which may involve a threat to use a weapon, against the staff member. An inmate's verbal threats do not justify using chemical agents.

(b) In order to ensure that chemical agents are used only as a last resort in these situations, the

staff member shall take the following steps, if feasible, before actually employing a chemical agent:

1. Communicate with the inmate;

2. Ask one or more other available people to communicate with the inmate, such as another security officer, a social worker, a crisis intervention worker, a member of the clergy, or a psychologist or psychiatrist;

3. Wait for a reasonable period of time, unless waiting would likely result in an immediate risk of harm to the inmate or to another person;

4. Make a show of force to the inmate;

5. Use physical power and strength; and

6. Use any other reasonable means short of applying a chemical agent to enforce an order.

(c) When s. HSS 306.06(3) permits the use of force and a staff member knows of an inmate's history of violent behavior in similar situations and reasonably believes that the inmate will become violent in this situation, a chemical agent may be used after the procedures in par. (b)1 to 4 have been followed but before the inmate physically threatens to use actual physical force.

(5) Prohibited Use. Chemical agents shall not be used when:

(a) It is clear that the chemical agents would have no physical effect on the inmate; or

(b) An inmate refuses to follow an order and exhibits no other behavior that would justify application of a chemical agent under sub. (3).

(6) Order of Use. When use of CN or CS is indicated, CN shall be used

first. If CN is ineffective, CS may be used.

(7) Use in Confined or Close Areas. In confined or close areas, only CN or CS may be used. In all respects, the manufacturer's safety instructions shall be followed.

(8) Use Outside and in Large Enclosed Areas. Tear gas grenades, projectiles, pepper foggers and riot shells may only be used in outside areas or in large enclosed areas in which the danger due to a reduction in oxygen is minimal.

(9) Authorization. Use of chemical agents may only be authorized by the following persons:

(a) In situations under sub. (3)(b) or (c), by the superintendent or his or her designee;

(b) In situations under sub. (3)(a), by the senior staff member present at the time and place; and

(c) In all situations under sub. (4), by the superintendent or deputy superintendent, or, if neither is present at the institution, the security director or, if that person is not available, the assistant superintendent on call or in charge of the institution.

(10) Application. Chemical agents may be employed only by a trained supervisor or staff member. When a chemical agent is used in a situation under sub. (4), the use shall be under the immediate supervision of a supervisor. Each institution shall ensure that every staff member authorized to use chemical agents is properly trained in their use.

(11) Medical Attention and Clean-Up. As soon as possible after a chemical agent has been used, all inmates who have been exposed to the

chemical shall be examined by the medical staff. These inmates shall have their eyes cleaned with water and be provided with a change of clothing. Exposed living quarters shall have bedding and mattresses changed and shall be thoroughly cleaned. Whenever CS is used, exposed inmates shall be offered an opportunity to shower.

(12) Incident Report. As soon as possible following the use of a chemical agent, an incident report shall be submitted to the director of the division's bureau of adult institutions. The incident report shall be as thorough as possible, describing:

(a) The problem leading to the use of the chemical agent;

(b) The steps taken prior to the use of the chemical agent;

(c) Why those steps were inadequate; and

(d) Measures taken following the use of the chemical agent.